IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. ———

ROBERT D. MORGAN,

Petitioner,

vs.

METRO-GOLDWYN-MAYER, INC.,
a Delaware corporation,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF
THE STATE OF ARIZONA

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METRO-GOLDWYN-MAYER, INC.,
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Respondent,

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF ARIZONA

Petitioner prays that a Writ of Certiorari issue to review the Judgment of the Court of Appeals of Arizona, entered in the above entitled case January 6, 1970.

CITATIONS TO OPINIONS BELOW

The opinion and decision of the Court of Appeals of Arizona, Division One, Dept. B, rendered January 6, 1970 affirming the Arizona Superior Court's order denying Plaintiff's Motion for new trial entered on July 25, 1967 is reported at 11 Ariz. App. 223, 463 P.2d 118, and is reproduced in Appendix C hereto (App. A-24).

The decision and dissent in *Morgan v. Hays* of the Supreme Court of Arizona in certiorari proceedings rendered April 12, 1967, is reported at 102 Ariz. 150, 426 P.2d 647, and is reproduced in Appendix B hereto (App. A-3).

JURISDICTION

The Judgment and decision of the Arizona Court of Appeals, Division One, Dept. B, was entered on January 6, 1970. Rehearing was denied on February 19, 1970. Petition for Review was denied March 17, 1970 by the Arizona Supreme Court.

This Court's order signed by Mr. Justice Stewart granted an extension of time within which to petition this Court for certiorari to and including August 13, 1970.

The jurisdiction of this Court is invoked by reason of the provisions of Title 28 United States Code § 1257(3).

QUESTIONS PRESENTED

1. Where a state court has been ousted of Jurisdiction and an injured workman denied the right to a jury trial by means of fraud conceived and perpetrated by the chief counsel of the Industrial Commission of Arizona and its subordinate employees, does the Seventh and Fourteenth Amendments of the Constitution of the United States become applicable to the States in order to protect this fundamental right, essential to a fair trial on the issues of fraud, election of remedies and waiver of said workman's right to sue his employer at common law to recover damages under Article 18 § 8 Arizona Constitution and A.R.S. § 23-906 D. and E?

2. Does the Due Process Clause of the Fourteenth Amendment protect the right to a jury trial guaranteed by the Seventh Amendment in a civil case involving substantial property rights which otherwise would be destroyed without a trial because of the refusal of the state courts to accept jurisdiction?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions which are involved will be set forth verbatim in Appendix F-1 through F-8 inclusive (App. A-52-56).

The Seventh and Fourteenth Amendments to the Constitution of the United States (App. A-52), Constitution of Arizona, Article 18 § 8 (App. A-53), Article 18 § 6 (App. A-53), Article 2 § 23 (App. A-52), A.R.S. § 23-906 (App. A-54-55), A.R.S. § 23-1061A (App. A-55), Rule 60(c) A.R.C.P. 16 A.R.S. (App. A-56).

STATEMENT OF THE CASE

Robert D. Morgan, petitioner, was employed by Metro-Goldwyn-Mayer, Inc., (hereinafter referred to as "M-G-M") prior to April 9, 1962, as a stunt man in the filming of the movie, "How the West Was Won." On location near Superior, Arizona on that day, while in discharge of his duties, he was knocked under the wheels of a railroad car due to the reckless conduct of an assistant director, as a result of which Morgan suffered gross and crippling injuries. His right eye was destroyed, his left leg was caused to be amputated substantially above the knee, and he was otherwise most severely injured about the face, head and body.

Subsequently, on the 13th day of December, 1962, petitioner filed a common law action against M-G-M in the Superior Court of the State of Arizona, in and for the County of Maricopa, for permanent injuries and loss of earnings which to date, after eight and one-half years, total in excess of $225,000.00, predicated upon his proven earning capacity. Petitioner alleged that an inexperienced co-employee negligently caused Morgan to be knocked

under the wheels of the train on which he was performing, causing the wheels of three cars to run over him, thereby inflicting the injuries complained of with consequent pain, suffering, permanent injury and loss. Further, that M-G-M on the date of said injury had wholly failed to comply with the requirements of A.R.S. § 23-906, requiring that notices of Workmen's Compensation be conspicuously and continuously posted on the job site and rejection blanks be made available to all employees for their use in rejecting Workmen's Compensation benefits prior to injury, and that by reason of M-G-M's failure so to do, Morgan elected to sue his employer at common law for the injuries and loss sustained pursuant to said statute.

M-G-M answered, generally denying the allegation of negligence and pleading multiple defenses including the one pertinent hereto — lack of jurisdiction upon the grounds that petitioner had accepted benefits and thereby waived his right to sue his employer at common law, assumption of risk, and contributory negligence.

On April 30, 1964, M-G-M filed a motion to dismiss under Rule 12(b) and (d) Arizona Rules of Civil Procedure, 16 A.R.S.[1] upon the grounds stated in the answer that the court lacked jurisdiction by reason of Morgan's acceptance of workmen's compensation benefits thereby electing his remedy and waiving his right to sue; and sought a preliminary hearing to the court upon these issues. On May 19, 1964 defendant's motion for preliminary hearing was granted over plaintiff's objection[2] (including the objection that such a hearing would deny plaintiff of his right to jury trial under the Seventh Amendment of the United States Constitution). Pretrial order was entered, which, among other things adjudicated that the motion to dismiss on the jurisdictional

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[1] Arizona has adopted the Federal Rules of Civil Procedure and Rule 12(d) is identical with the Federal Rule.

[2] See *Magenau v. Aetna Freight Lines*, 79 S.Ct. 1184, 360 U.S. 273, 3 L.Ed.2d 1224, 1229 and See *Byrd v. Blue Ridge Rural Elec. Coop.* 78 S.Ct. 893 (1958), 356 U.S. 525, 2 L.Ed.2d 953, 962.

question would be heard without a jury but that the issues of negligence and damages would be submitted to a jury.

On June 4, 1964 petitioner sought certiorari upon said order in the Arizona Supreme Court cause No. 8407, on the grounds that his right to a jury trial had been denied. The Supreme Court refused to issue said writ on June 9, 1964.

Thus, the preliminary hearing on jurisdiction was conducted before a trial judge, sitting without a jury, commencing on June 10, 1964, and continuing on through the eleventh, twelfth and fifteenth days of June, 1964, at which time the court ordered a jury for the following day's trial. On June 16, 1964, at the conclusion of argument on the legal and factual issues, the court took defendant's motion to dismiss for lack of jurisdiction under advisement and declined to rule on the jurisdictional question in advance of a jury trial on the remaining issues of negligence and damages. M-G-M then petitioned the Arizona Supreme Court for a writ of mandamus (Cause No. 8421), demanding that the trial judge be ordered to rule on the jurisdictional question before proceeding further. The Arizona Supreme Court on that same day, without written opinion (contrary to Article 6 § 2 of the Constitution of Arizona) issued a preemptory writ directing the trial court to rule. On June 17, 1964 the trial court granted M-G-M's motion to dismiss for lack of jurisdiction. Findings of fact, conclusions of law and judgment thereon was entered on January 5, 1965. Among its findings and conclusions the court found that Morgan, on or about April 23, 1962, had either executed or caused to be executed and filed with the Industrial Commision of Arizona the "Workman's Report of Injury and Application for Benefits" (denominated throughout the record as Form C-407 App. A-39.) (patently referring to the forged document Jurgemeyer had obtained as hereinafter set forth); and that pursuant thereto he had received and accepted both medical and compensation benefits, thereby effectively making an irrevocable election of remedies and waived any right or option to sue his employer at common

law, even though the court also found that M-G-M had not fulfilled its statutory duty to post workmen's compensation notices on the job site (App. A-54).

At this point, Morgan again petitioned the Arizona Supreme Court (Cause No. 8653) for a writ of certiorari to review said judgment upon the grounds, among others, that he had been denied the right of trial by jury on the issues contrary to the provisions of Article 2 § 23 of the Arizona Constitution and the Seventh and Fourteenth Amendments to the Constitution of the United States. This writ was granted and on April 12, 1967 the Supreme Court of Arizona, in a split three-to-two decision affirmed, with Justice Fred C. Struckmeyer authoring a vigorous dissent, concurred in by Chief Justice Charles C. Bernstein. The decision is reported at 102 Ariz. 150, 426 P.2d 647 (App. A-3).

Within the time permitted by the rule, Morgan next filed in this Court a petition for certiorari to review the aforesaid judgment of the Supreme Court of Arizona upon the grounds that petitioner had been denied the right of jury trial guaranteed by the Seventh and Fourteenth Amendments and that he had further been denied due process of law (Cause No. 454, October Term, 1967) On October 9, 1967, the majority voted to deny the writ with Mr. Justice Black and Mr. Justice Douglas voting to grant (389 U.S. 859, 19 L.Ed.2d 125, 88 S.Ct. 105).

Charles M. Brewer, counsel for petitioner, on or about March 15, 1965 first discovered that the trial court had been ousted of jurisdiction by means of multiple acts of fraud (A.R. 168). This occurred at a luncheon meeting between Mr. Brewer and Richard J. Daniels, chief counsel of the Industrial Commission of Arizona and who was associated as co-counsel for M-G-M in the aforesaid preliminary hearing. Daniels revealed the fact that Glenn E. Jurgemeyer, claims investigator for the Industrial Commission of Arizona who purportedly obtained the "Workman's Report of Injury and Application for Benefits" (Form C-107), had been secreted or was told to absent himself from Maricopa

County to avoid testifying at the trial. Having been unable to serve Jurgemeyer with a subpoena requiring his attendance at the preliminary hearing, Brewer in concert with two other attorneys, interrogated Jurgemeyer in the presence of the chief investigator of the Industrial Commission of Arizona (Elmer Snow) with Jurgemeyer admitting in the recorded interview that he had never seen Morgan in the hospital and that he neither obtained nor filed the Form C-407 purportedly signed by Morgan and filed with the Commission (App. A-39). Concluding from this that Morgan's signature on the Form C-407 was a forgery, Brewer promptly secured the services of Dr. Paul Kirk, a qualified and nationally known criminologist, consultant on questioned documents and handwriting expert, who examined the document Form C-407 and executed an affidavit that Morgan's signature appearing on the said Form C-407 was either a forgery or placed thereon by the direct intervention of another person who guided the hand of Morgan in affixing his signature thereon (App. A-40). Jurgemeyer was next interrogated by the Maricopa County Attorney's Office at which time he admitted that he obtained the Form C-407 from Morgan and that he did not in any way assist Morgan in affixing his signature thereto. He further stated that he secured said signature between 10:30 and 11:00 a.m. on April 23, 1962.

This version of Jurgemeyer's complicity in the fraud is made wholly incredible by the affidavits of two of Morgan's physicians who were in attendance at his bedside removing wire sutures from his leg preparatory to surgery thereon scheduled later in the day. The physicians were assisted by a nurse who recorded on her patient's hospital chart (nurses notes) that the procedures carried out by the physicians were performed at the exact time Jurgemeyer claims to have obtained Morgan's signature. Both physicians and the nurse unequivocably state that neither Jurgemeyer nor any other claims investigator was in Morgan's room at the time or even on the day Jurgemeyer claims to have obtained the C-407.

Dr. Willard Hunter, Morgan's orthopedic surgeon, gave an

affidavit in which he verifies that he not only advised the nurse not to let anyone attempt to contact Morgan at said time but that Morgan at that time was neiher lucid nor rational and lacked comprehension, and was physically unable to even hold a fountain pen because of his position on the fracture bed in which he lay (App. A-43). Morgan's other physician, Dr. Paul B. Jarrett, confirms petitioner's complete incapacity on said date (A.R. 211). Morgan's special nurse (Krouse) not only corroborates the statements of the two physicians but further alleges that Industrial Commission employees attempted a bribe to secure her testimony at the preliminary hearing to the effect that Morgan was lucid or rational at or near the time he purportedly executed the C-407, for which said Commission would award her workmen's compensation upon a claim then pending with the Commission for injuries purportedly sustained while employed at another hospital (App. A-46). This attempted bribe is corroborated in full by a "Memorandum Confidential" from the chief special agent of the Industrial Commission to its chief counsel, the said Richard J. Daniels, explaining that workmen's compensation had been paid to nurse Krouse "in order to put her in a more cooperative frame of mind" (App. A-44). After a new chief counsel had been appointed for the Industrial Commission, Glenn E. Jurgemeyer gave his third version of his complicity in the "Morgan affair" admitting in writing that he had secreted himself in Pinal County, Arizona under an assumed name until after the preliminary hearing had been concluded at the express direction of Richard J. Daniels (App. A-51). The foregoing was corroborated by other responsible officials of said Industrial Commission, to wit: Elmer E. Snow, chief investigator (A.R. 194), C. E. Singer, Jr., chief referee (App. A-50), T. H. (Jack) Newman, Jr., legal investigator (A.R. 229), Archie R. Tufts, claims investigator (A.R. 244).

Based on this newly discovered evidence of fraud contaminating the judgment, petitioner filed a motion for a new trial in the

Superior Court of Maricopa County, under Rule 60(c) A.R.C.P. showing the following:

1. That the "Workman's Report of Injury and Application for Benefits" purportedly filed by Robert D. Morgan was a forgery. On April 23, 1962, Morgan was physically incapable and mentally incompetent by reason of his injuries to execute such an instrument or to comprehend the nature or consequences of any act according to his doctors and nurse who emphatically deny the presence of any state claims agent.

2. That Richard J. Daniels, chief counsel for the Industrial Commission of Arizona (also employed as associate counsel and as a witness for M-G-M at the preliminary hearing) had directed and caused Glenn E. Jurgemeyer, the Industrial Commission claims investigator who purportedly procured the "Workman's Report of Injury and Application for Benefits" (Form C-407) to avoid a subpoena issued out of the court requiring his attendance at the trial and to absent himself from Maricopa County under an assumed name until the cause had been concluded, thereby preventing petitioner from fully exhibiting his case.

The 60(c) motion and relevant portions of the supporting documents furnished to the trial court are contained in the Appendix E 1-9 (App. A-34-51). Said motion was continued by stipulation of the parties pending determination of the prerogative writ to the Arizona Supreme Court (No. 8653) above and was ultimately denied after oral argument by formal written order on July 25, 1967. An appeal from said order was taken by Morgan to the Court of Appeals of the State of Arizona, Division One, Department B, which court rendered its decision on January 6, 1970 affirming the denial of petitioner's motion for new trial. Rehearing was denied by said court February 19, 1970 and petition for review to the Supreme Court of the State of Arizona was denied on March 17, 1970. On June 16, 1970 Mr. Justice Potter Stewart, upon Morgan's petition, ordered that the time for filing

a petition for Writ of Certiorari herein be extended to and including August 13, 1970.

ARGUMENT AND REASONS FOR GRANTING WRIT

Petitioner urges the following reasons why the petition for Writ of Certiorari should be granted in this case:

The petitioner has been denied the fundamental right to trial by jury deemed essential to a fair trial upon the issues of fraud, waiver, and election of remedies, resulting in the refusal of the state court to assume jurisdiction. The contest from its inception was unequal, and remained so throughout the proceeding because the fraud was practiced upon petitioner by representatives of the Industrial Commission of Arizona and his employer M-G-M at a time when Morgan was rendered physically helpless and mentally insensible from the near fatal injuries sustained in performance of his work. On April 23, 1962 while Morgan was virtually moribund, Glenn E. Jurgemeyer, the Industrial Commission claims investigator, procured a forged or otherwise fraudulent "Workman's Report of Injury and Application for Benefits" (Form C-407) bearing petitioner's purported signature thereon and which was received in the Commission's office on April 24, 1962. The claim was thereupon approved for payment and the Commission issued checks in partial payment of petitioner's medical expenses for hospital, doctors and nursing care and treatment and further issued a number of compensation checks payable to petitioner commencing with the date of April 27, 1962 and concluding on November 21, 1962. These checks were deposited to Morgan's acciunt although there is not a scintilla of evidence in the record that Morgan was advised, knew or understood that by accepting the same he was electing his remedy under the Workmen's Compensation Act and was waiving his right to sue his employer.

The filing of the "Form C-407" together with the payment of benefits as aforesaid, constituted the elements of M-G-M's defense asserted at the preliminary hearing in the state court between dates

of June 10th and 15th, 1962. The federal question as to whether petitioner was entitled to a jury trial of the issues under the Seventh Amendment was promptly raised at the trial level in Morgan's objections to M-G-M's request for a hearing under Rule 12(d); and petitioner's right to a jury trial under the Seventh and Fourteenth Amendments was again raised in Morgan's petition for certiorari to the Arizona Supreme Court (No. 8653) which was granted to review the findings, conclusions and judgment entered on January 5, 1965, by the trial court at the conclusion of the preliminary hearing. The Arizona Supreme Court in its decision on an extended certiorari filed April 12, 1967 in *Morgan v. Hays*, supra, affirmed the trial court's denial of the right to a jury trial without mention of the federal constitutional guarantees, and in ruling on the merits held the findings, conclusions and judgment to be sustained by the evidence.

While this petition for certiorari is taken from the judgment of the Court of Appeals of the State of Arizona, sustaining the superior court's denial of petitioner's motion for new trial under Rule 60(c) A.R.C.P., it is submitted that petitioner is not thus foreclosed from reliance on the basic and fundamental right to a trial by jury preserved by Article 2 § 23 of the Arizona Constitution and the guarantees of the Seventh and Fourteenth Amendments of the United States Constitution in that the federal question, having been considered in the Supreme Court of Arizona on the certiorari (No. 8653) is properly before this Court. *Gant v. Oklahoma City*, 289 U.S. 98, 53 S.Ct. 530, 77 L.Ed. 1058; *Washington ex rel. Grays H. L. Co. v. Superior Court*, 243 U.S. 251, 37 Sup.Ct.Rep. 295, 61 L.Ed. 702; *Erie R. Co. v. Purdy*, 185 U.S. 148, 154, 46 L.Ed. 847, 850, 22 Sup.Ct.Rep. 605; *Southern R. Co. v. Kentucky*, 274 U.S. 76, 90, 91, 47 Sup.Ct.Rep. 542, 71 L.Ed. 934, 941; *Reece v. Georgia*, 350 U.S. 85, 100 L.Ed. 77, 76 S.Ct. 167.

As stated, the Arizona Supreme Court sustained the superior court judgment for lack of jurisdiction upon the assumption that Morgan had knowingly applied for and accepted the benefits pro-

vided under the Workmen's Compensation Act, and that by reason thereof was conclusively deemed to have waived his right to sue at common law under state statutes and case law. On the motion for new trial, it was conclusively shown:

1. That Morgan did not execute the "Workman's Report of Injury and Application for Benefits," but that his signature on said form C-407 was the product of a forgery (App. A-40, 42);

2. That Morgan was physically incapable of signing and mentally incompetent to understand or comprehend the significance of the election of remedies accomplished thereby (App. A-43, 46);

3. That the judgment was tainted by fraud conceived and directed by Richard J. Daniels — chief counsel for the Industrial Commission of Arizona and co-counsel for M-G-M in the conduct of the preliminary hearing, intentionally causing Glenn E. Jurgemeyer to avoid the service of a subpoena issued at the request of petitioner's counsel requiring said witness's testimony to be given at said hearing, and further causing said witness to be secreted outside the county where the hearing was conducted under an assumed name until the case had been concluded, thereby effectively preventing Morgan from fully exhibiting his case and demonstrating the fraud which was ultimately unfolded (App. A-51).

Where, as in this case, a litigant has been prevented from fully exhibiting his case by fraud, either in the presentation of forged instruments, perjured testimony, or in secreting witnesses, thereby influencing the judgment entered, a new trial must be granted. *U.S. v. Throckmorton*, 98 U.S. 61, 25 L.Ed. 93 (1878); and see *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 246, 64 S.Ct. 997, 88 L.Ed. 1250 (1944); and *Pickford v. Talbott*, 225 U.S. 651, 56 L.Ed. 1246, 32 S.Ct. 687, holding that when a judgment is procured by a fraud on the court, the insult to public institutions is so great that it cannot be tolerated in an ordered society and requires a new trial. Where either perjured testimony or forged documents influence the rendition of a judgment it

becomes the duty of a court to grant a new trial; *Peacock Records, Inc. v. Checker Records, Inc.*, (7th Cir. 1966) 365 F.2d 145, 147; and see *Brady v. Beams* (10th Cir. 1942) 132 F.2d 985-987, wherein it is, among other things, held that wrongfully preventing a material witness from attending the trial constitutes extrinsic fraud upon the court justifying relief. Accord: *Clavey v. Loney*, 80 Cal.App. 20, 251 Pac. 232; *Godfrey v. Godfrey*, 80 Cal. App.2d 370, 86 P.2d 357; *Jeffords v. Young*, 277 P.2d 163 (Cal.).

Having prevailed in the hearing conducted under Rule 12(b)(d) A.R.C.P. because of the fraud practiced upon the court by one of its attorneys, M-G-M is estopped to dispute or refute the effectiveness of the contrivances bringing about the judgment and appellate court decisions based thereon which followed. *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, supra; nor will it be permitted to escape the consequences of the deception practiced upon all the courts which have heretofore undertaken to review this cause on a record then seemingly devoid of fraud. See also, *Peacock Records, Inc. v. Checker Records, Inc.*, supra.

Except for Morgan's forged signature upon the Form C-407 and the wholly unauthorized filing of the same, the Industrial Commission of Arizona would have been entirely without jurisdiction and could not have made an award of benefits of any kind. The Arizona Supreme Court in its recent decision of *Collins v. The Industrial Commission*, 102 Ariz. 509, 433 P.2d 801, acknowledges that no jurisdiction is granted the Industrial Commission of Arizona until a formal application is filed pursuant to A.R.S. § 23-1061 (App. A-55).

At this point we deem it imperative to point out that the Arizona legislature intended a built-in safeguard to prevent overzealous claims investigators or other industrial commission personnel from defrauding injured workmen or subverting the purposes of the Act, in that § 23-1061 in part states:

"* * * The physician *shall inform* the injured employee of

his rights under this chapter and *shall give all necessary assistance in making the application for compensation* and such proof as required by the rules of the Commission without charge." (Emphasis supplied)

There is not one scintilla of evidence that anyone informed Morgan as to his rights on April 23, 1962, when the C-407 purportedly was obtained. The evidence is exactly to the contrary, for Dr. Willard S. Hunter had in effect placed a "no visitors" sign on Morgan's door, barring all claims men and other investigators interested in the case, because Morgan was in such poor mental and physical condition he simply wasn't competent to deal with them (App. A-43).

If Glenn E. Jurgemeyer, Industrial Commission claims investigator who procured and filed the C-107 with the Commission, had not been secreted from the trial at the direction of the Commission's chief counsel, Richard J. Daniels, the shabby fraud perpetrated upon petitioner could have been detected by the court and the hypocrisy of M-G-M's procedural strategy and substantive defense on the jurisdictional aspect laid bare.

As the matter stands here it is plain that notwithstanding state law seemingly giving petitioner the right to his day in court, state judges have either been unequal to the task or insensitive to the commands of not only the State Constitution but also the Due Process Clause of the Fourteenth Amendment protecting the Seventh Amendment to the United States Constitution. The view that in case brought under the provisions of the Workmen's Compensation Act the trial court's jurisdiction was a question of law to be determined by the court without a jury was first given voice in the United States Court of Appeals in *Taylor v. Hubbell*, (9th Cir. 1951) 188 F.2d 106, which was followed by the Arizona Supreme Court a short time later in its decision in *State v. Pressley*, 74 Ariz. 412, 250 P.2d 992 (1952). Arizona has ever since adhered to the rule thus laid down although it seems to have countenanced a jury trial upon the same jurisdictional

question here at issue in *Juvne v. Del E. Webb Constr. Co.*, 76 Ariz. 418, 265 P.2d 1076 (1954) wherein it is said:

> "The important issue to determine in this appeal is whether appellant submitted any competent evidence that entitled *him to go to the jury upon the ground that defendant-appellee failed to post a notice as required by the statute.*" (Emphasis supplied)

Moreover, the 9th Circuit decision in *Taylor v. Hubbell*, supra, is not consistant with its prior decision in *Miles v. Lavender*, (9th Cir. 1926) 10 F.2d 450, which recognized the necessity of a jury trial when expressly dealing with the question of election of remedies under the Arizona Workmen's Compensation Act. In that case an injured workman was allowed to prevail even though he had applied for and accepted benefits for a substantial period before commencing his action in the District Court of Arizona. The view that a written election may be considered voidable by a claimant under the Arizona Workmen's Compensation Act if there has not been an intentional abandonment of a known right or privilege is again expressed in *United States v. Miller*, (9th Cir. 1964) 331 F.2d 414, 416 which held that a claimant was not foreclosed by having had accepted compensation payments in Arizona for a period of twenty-three months where it did not appear that the claimant had knowledge of her rights. The 9th Circuit seems to have come full circle since in 1959 that court in *Marks Food Corporation v. Barbara Ann Baking Co.*, 274 F.2d 934, sustained the right to a jury trial and quoted extensively from *Beacon Theatres v. Westover*, 359 U.S. 500, 3 L.Ed.2d 988, 79 S.Ct. 948, and in a footnote qualified its holdings in *Taylor v. Hubbell*, supra.

The foregoing makes it clear that petitioner here is the victim of a construction of state law which was originated in the federal courts although such courts have now abandoned their prior views. Albeit, Arizona courts, in this type of action, deny petitioner a jury trial upon issues which are questions of fact.

The issues of waiver, release, election of remedies, in common

law civil actions have always been triable to a jury in both the state and federal courts: *Smith v. Price Bros. Co.*, (6th Cir. 1942), 131 F.2d 750, *cert. denied*, 318 U.S. 762, 87 L.Ed. 1134, 63 S.Ct. 560; *Dice v. Akron C. & Y. R. Co.*, 342 U.S. 359, 96 L.Ed. 398, 72 S.Ct. 312; *Johnson v. American-Hawaiian S. S. Co.* (9th Cir. 1938), 98 F.2d 847; *Miles v. Lavender*, supra; *Byrd v. Blue Ridge Rural Elec. Coop.*, supra.

See also *Ross-Engineering Co. v. Pace* (4th Cir. 1946), 153 F.2d 35, 50 (waiver); *Cannon v. Travelers Indemnity Company* (8th Cir. 1963) 314 F.2d 657 (waiver); *Coules v. Ohio Farmers Insurance Group* (4th Cir. 1957), 242 F.2d 73; *Buffum v. Chase Nat. Bank of City of New York* (7th Cir. 1951) 192 F.2d 58, *cert. denied*, 342 U.S. 944, 96 L.Ed. 702, 72 S.Ct. 558.

State courts also grant jury trials on issues of waiver and release. See *Arizona Title Guarantee & Trust Co. v. Modern Homes*, 84 Ariz. 399, 330 P.2d 113 (1958); *Murphey v. Valenzuela*, 95 Ariz. 30, 386 P.2d 78 (1963); *City of Tucson v. Koerber*, 82 Ariz. 347, 313 P.2d 411 (1957); *In re Brandt's Estate*, 67 Ariz. 42, 190 P.2d 497 (1948); *Meason v. Ralston Purina Co.*, 56 Ariz. 291, 107 P.2d 224; *Southwest Cotton Co. v. Valley* Bank, 26 Ariz. 559, 227 Pac. 986 (1924); and also grant jury trials on issues of fraud:

Lumbermen's Reciprocal Ass'n v. Day (Tex.) 17 S.W.2d 1043; 270; *Duncan v. Texas Employers' Ins. Ass'n* 105 S.W.2d 403, 405; *Bullocks v. Texas Employers' Ins. Ass'n* 254 S.W.2d 554; Mich.) *Southern Pacific Co. v. Gastelum*, 36 Ariz. 106, 123, 283 Pac. 719; *Brown v. Ann Arbor R. Co.*, 183 Mich. 574 149 N.W. 1030.

Though adjuring for decades that the first ten Amendments are not concerned with state action, and a corollary that the Seventh Amendment applies only to proceedings in the courts of the United States and does not in any manner whatever govern or regulate trials by jury in state courts as the standards which must be applied concerning same, *Minneapolis & St. L. R. Co. v. Bombolis*, 241 U.S. 211, 60 L.Ed. 961, 36 Sup. Ct. 595;

this Court has not remained insensitive to the necessities for changes in the construction of these Amendments.

Fact questions on the issue of fraud, waiver, and release have uniformly been considered issues which must be submitted to a jury under both state and federal law. We should be immodest, did we not urge Justice Struckmeyer's dissent (concurred in by Chief Justice Bernstein) in *Morgan v. Hays,* supra, (App. A-14), as our best reasons why Morgan is entitled to a jury trial under state law. Where fraud has tainted the judgment at issue, the reasoning of that dissent becomes much more persuasive, even though the facts disclosed in petitioner's 60(c) motion were unknown, and were not considered at the time the case was reviewed by the Arizona Supreme Court.

Although petitioner clearly, convincingly, and indeed conclusively, demonstrated that the judgment dismissing plaintiff's complaint was the result of fraud which was not known at the time of the hearing or shown to the Arizona Supreme Court on the certiorari, (and patently was not considered there) the trial court, remaining obdurate on the jurisdictional question, denied relief, and the Court of Appeals affirmed, *Morgan v. Hays,* supra, on the grounds or res judicata, citing the very findings and conclusions entered by the trial court relied upon in the Arizona Supreme Court's decision on the certiorari, which were and are irredeemably tainted by the fraud practiced on the court in secreting a material witness and forging documents prerequisite and indeed indispensible to any attempt to oust the court of jurisdiction. Moreover, it is uniformly held that the doctrine of res judicata may not be invoked to sustain a judgment obtained by means of fraud. The reason is well stated in 30A Am.Jur., *Judgments,* §358, pp. 399-400. Arizona is committed to the principle that a final judgment may always be impeached for fraud, *Tube City Min. etc. Co. v. Otterson,* 16 Ariz. 305, 146 Pac. 203; *City of Phoenix v. Greer,* 43 Ariz. 214, 29 P.2d 1062. The rule is particularly applicable where, as here, the fraud goes

to the jurisdiction of the court; *Grand I. B. of Locomotive Engrs. v. Mills*, 43 Ariz. 379, 31 P.2d 971.

Lastly, there was no impediment to the filing of the 60(c) motion after the Supreme Court's ruling on the certiorari, since petitioner first returned to that court and was there granted leave to seek relief if any was to be granted at the trial level.

Lying at the very threshold of our contention that this Court should issue the writ under the Due Process Clause of the Fourteenth Amendment is the illuminating language of the majority opinion in *Duncan v. Louisiana*, 391 U.S. 145, 20 L.Ed.2d 491, 88 S.Ct. 1444, wherein the majority recounts that no less than five of the first ten Amendments to the Constitution are now made applicable to the states.

While Mr. Justice White did not in that decision include the Eighth Amendment among those protected against state action by the Due Process Clause, it must certainly be included under *Gideon v. Wainwright*, 372 U.S. 335, 9 L.Ed.2d 799, 8 S.Ct. 7921, 93 A.L.R.2d 733. From this we observe that the necessities of the people have changed this Court's construction of the Bill of Rights from its early position that none of the first ten Amendments were applicable to the states, *Minn. & S. L. R. Co. v. Bombolis*, supra, to the current status where fifty per cent of said first ten Amendments have been held by this Court to be applicable to the states. We are not aware that this Court has directly held that the Seventh Amendment guarantees a jury trial under state law, and yet there is no reason why this should not be so in this unique and selective case. Here the record shows that an agency of the State of Arizona, through its responsible officials and employees, have defrauded a crippled workman out of his day in court. Despite strenuous efforts to correct the wrong, Morgan is still without a remedy, although undeniably he has the right to sue his employer under the Constitution of the State of Arizona, Article 18 §8, (App. A-53) and the statutes enacted by the legislature pertinent thereto, A.R.S. §23-906. These circumstances

patently show that Morgan's right is among those "fundamental principles of liberty and justice which lie at the base of all our civil and political institutions"; it is a right "basic in our system of jurisprudence" and it is "a fundamental right essential to a fair trial". These paraphrases from *Duncan v. Louisiana,* supra, are the heart of the quest here.

If the potential of a jail sentence of two years on a conviction for an offense triable without a jury was sufficient to invoke the Fourteenth Amendment to protect rights guaranteed under the Sixth Amendment (*Duncan v. Louisiana,* supra), then surely the same reasoning requires that the Seventh Amendment protect a jury trial in this civil action for damages which have stripped Morgan of his manhood as well as his livelihood.

No tribunal has been more sensitive than this Court to the necessity for updating and even upgrading the quality of the law throughout the nation, especially as it relates to due process in all of its applications.

Parker v. Gladden, 385 U.S. 363, 17 L.Ed.2d 420, 87 S.Ct. 468, while dealing with a criminal case, is a clear indication that when state officers (there a court bailiff) prejudice the rights of a defendant in the eyes of a jury it is sufficient to be controlled by the command of the Sixth Amendment made applicable to the states through the Due Process Clause of the Fourteenth Amendment. Here petitioner was prejudiced in an even more serious manner since his entire life is affected by his loss of sight and limb.

Either it should be held that the Seventh Amendment is applicable to the states or that the fraud perpetrated by the chief counsel and subordinate employees of the Arizona Industrial Commission violated the requirement of fundamental fairness assured by the Due Process Clause of the Fourteenth. See Mr. Justice Harlan's concurring opinion in *Klopfer v. North Carolina,* 386 U.S. 213, 18 L.Ed.2d 1, 87 S.Ct. 988.

CONCLUSION

The Writ of Certiorari should issue in this case for the reasons stated.

Respectfully submitted,

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Certificate of Service

I Hereby Certify that three true copies of the foregoing Petition for a Writ of Certiorari and Appendix thereto were delivered to Robert Park, Chief Counsel, Arizona State Compensation Fund, 1616 West Adams Street, Phoenix, Arizona, 85007, and to Jennings, Strouss & Salmon, 111 West Monroe Street, Phoenix, Arizona, 85003, this 12th day of August, 1970.

Stewart L. Udall

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SUPREME COURT OF THE UNITED STATES

October Term, 1970

No. 532

ROBERT D. MORGAN,

Petitioner,

vs.

METRO-GOLDWYN-MAYER, INC.
a Delaware corporation,

Respondent,

BRIEF IN OPPOSITION TO
PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF
THE STATE OF ARIZONA

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